Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 2004

PETER PAUL MITRANO,

Petitioner,

versus

MATTHAN HOUSER, BRENDAN HERBERT and JOHN TURNER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Hampshire

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PETITION FOR WRIT OF CERTIORARI

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Petitioner

April 2005

Questions Presented for Review

1. Is an ordinance that prohibits more than three football players from Dartmouth College from living together in a single family house based solely on the fact that they are "unrelated males" constitutional?

2. Does an unreasonably short restriction of time for the hearing of damages of an action by the trial court such as one hour amount to a denial of due process and equal protection?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the Supreme Court of the State of New Hampshire. Neither party is a parent, subsidiary or affiliate of any company.

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Peter Paul Mitrano respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of New Hampshire in this case.

Opinion Below

The decision of the Supreme Court of the State of New Hampshire from which petitioner seeks certiorari appears in the Appendix hereto at page A-1. The subsequent Order issued by the Supreme Court of the State of New Hampshire denying petitioner's motion for rehearing or reconsideration appears in the Appendix hereto at A-10. The Judgment Order of the trial court, the Superior Court, Grafton County also appears in the Appendix hereto at pages A-2. All lower court decisions are unreported.

Jurisdiction

The decision of the Supreme Court of the State of New Hampshire was entered on November 30, 2004. (A-1) A timely motion for rehearing or reconsideration was filed on December 10, 2004; an Order denying the motion for rehearing or reconsideration was entered by the Supreme Court of the State of New Hampshire on January 6, 2005. (A-10) This petition for writ of certiorari was filed within ninety days of said date of January 6, 2005. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(a).

Statutory Provision Involved

Section 210.1 F of the Hanover (New Hampshire) Zoning Ordinance states in part that:

> "Rentals: (1) Rental of Dwelling Unit:
>
> A non-owner-occupied dwelling unit may be rented as a residence for an unrelated family limited to 3 persons . . . ."

Statement of the Case

The wording of the arguments stated herein are essentially the same that were included in the arguments before the trial court and the Supreme Court of New Hampshire. This petition for writ of certiorari arises from the filing on action by the petitioner for a rent payment due on December 1, 2001 in the amount of $2,900. The respondents failed to pay said payment and litigation ensued. The respondents took the position that the above-quoted Hanover, New Hampshire ordinance stating that no more than three unrelated

persons could live in a single family house allowed the respondents to prematurely terminate the lease. The trial court ruled that the respondents were "forced to vacate the property five months prior to the expiration of the agreed upon lease term" (A-6) and that:

> ". . . It is clear that the number of students in this apartment (sic) exceeded the permitted rental unit occupancy levels established by the Town of Hanover . . . ." (A-8)

Reasons for Granting the Writ

1. Is an ordinance that prohibits more than three football players from Dartmouth College from living together in a single family house based solely on the fact that they are "unrelated males" constitutional?

The tenants allegedly rely upon a Town of Hanover zoning ordinance for support for their breach of the Lease Agreement. The alleged subject Town of Hanover zoning ordinance is unconstitutional under the Constitution of the United States. Petitioner also notes that Part I, Article 2 of the Constitution of the State of New Hampshire states that:

> "[Art.] 2d [Natural Rights.] All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and

> obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."

The petitioner notes that in *Town of Durham* v. *White Enterprises, Inc.*, 115 N.H. 645, 348 A.2d 706 (1975), the court ruled against the position of the petitioner on this issue and/or on a similar issue and/or an issue related to the issue stated herein; however, the petitioner steadfastly maintains that this Supreme Court should overrule and/or make an exception to the ruling in *Town of Durham* v. *White Enterprises, Inc.*, 115 N.H. 645, 348 A.2d 706 (1975) for the reasons stated herein.

This Supreme Court can take judicial notice that the rights and voice of homosexuals has changed radically since *Town of Durham* v. *White Enterprises, Inc.*, 115 N.H. 645, 348 A.2d 706 (1975). Twenty-nine years later, in today's world where the courts of various states are ruling that homosexuals have a right to marry and/or form civil unions, the homosexuals would be "up in arms" over a rule and/or law that prevented the homosexuals from forming households. Furthermore, there is a conflict with the relatively newly created law in the State of New Hampshire that states it is now against the law to discriminate against homosexuals. See New Hampshire RSA 354-A:8 which states that:

> **"354-A:8 Equal Housing Opportunity Without Discrimination a Civil Right.** The opportunity to obtain housing without discrimination

> because of age, sex, race, creed, color, martial status, familial status, physical or mental disability or national origin is hereby recognized and declared a civil right. In addition, **no person shall be denied the benefit of the rights afforded by this section on account of that person's sexual orientation.**" (Bold emphasis added.)

Also see New Hampshire RSA 354-A:10 which states in part that:

> "354-A:10 Unlawful Discriminatory Practices . . **no person shall be denied the benefit of the rights afforded by this section on account of that person's sexual orientation.** (Bold emphasis added.)
>
> "II. . . . **no person shall be denied the benefit of the rights afforded by this section on account of that person's sexual orientation.** (Bold emphasis added.)
>
> . . .
>
> "VII. . . . **no person shall be denied the benefit of the rights afforded by this section on account of that person's sexual orientation.**" (Bold emphasis added.)

Thus, it is apparent that the petitioner is caught in a classic catch-22 situation. *Arguendo*, if a group of homosexuals desire to rent a dwelling, a landlord is confronted with violating the above-quoted language dealing with fair housing or the subject ordinance from the Town

of Hanover. Suppose the homosexuals have just left the State of Vermont after having entered into their "civil unions", are they now related or unrelated? Suppose the homosexuals have arrived from the Commonwealth of Massachusetts are having been married pursuant to the recent court decision that allows homosexuals to become married, what is a landlord to do?

In addition, for the same legal reasons that this Supreme Court ruled in the case of *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 279 (1985) ("a State must accord residents and nonresidents equal treatment" under Article IV, § 2 of the United States Constitution) that the State of New Hampshire could not require its bar applicants to be residences of the State of New Hampshire in order to be admitted to the bar of the State of New Hampshire, the Town of Hanover cannot allow owner occupied dwellings to exceed the number of unrelated persons while at the same time denying non-owner occupied dwellings the alleged right to exceed the number of unrelated persons. The double standard for non-owner occupied and owner occupied dwellings is not allowable under the law. In summary, the alleged ordinance from the Town of Hanover conflicts with New Hampshire RSA 354-A:8 and RSA 354-A:10 which state in essence that a landlord cannot discriminate against homosexuals.

Other states that have recognized the alleged rights of homosexuals have ruled that an ordinance along the lines of the subject ordinance is unconstitutional. In *Charter TP. of Delta* v.

Dinolfo, 351 N.W.2d 831, 839, 840, 842, 844 (Mich. 1984), the court held that a similar ordinance limiting the number of persons within a residential dwelling was unconstitutional and stated in part that:

> "The dispute here is not between contending land uses, but about who can occupy a residential dwelling. In evaluating the relative merits and effects of mixing related and non-related persons in a single-family dwelling, planning expertise becomes more questionable and human experience and values more paramount. Thus, our task here is not to evaluate the reasonableness of the township's designation of one land use as opposed to another, but, rather, to evaluate whether the existence of the distinction made is permissible.
>
> . . .
>
> ". . . Where the difficulty arises, however, is when plaintiff attempts to convince us that the classification at hand—limiting to two the number of unrelated persons who may occupy a residential dwelling together or with a biological family—is reasonably related to the achievement of those goals. It is precisely this rational relationship between the means used to achieve the legislature goals the must exist in order for this deprivation of the defendants'

use of their property to pass the due process test.

. . .

"Plaintiff brings to our attention cases from those jurisdictions that have adopted the *Belle Terre* rationale. One in particular, *Town of Durham v. White Enterprises, Inc.*, 115 N.H. 645, 649, 348 A.2d 706 (1975), is typical of that point of view. There the court said:

> '*The State has no particular interest in keeping together a certain group of unrelated persons.* The State has a clear interest, however in preserving the integrity of the biological or legal family. The promotion of this legitimate government purpose justifies the exclusion of a blood related family from the density requirements of the ordinance which applies to an unrelated household. * * * Hence this classification is not invidious or arbitrary and is constitutional.' (Italicize emphasis in quoted text.)

"Indeed, 'the State has no particular interest in keeping together a certain group of unrelated persons', **but, most certainly, it has no business keeping them apart, absent a valid reason for doing so**. (Bold emphasis added.)

. . .

". . . Although we have criticized the result in *Town of Durham v. White Enterprises, Inc., supra*, that decision does point out one factor which distinguishes families from groups of unrelated persons. As the court in *Durham, supra*, 115 N.H. p. 649, 348 A.2d 706, stated:

'If an unrelated household group exceeds the designated density requirement it is by voluntary action of the group. The blood related family by its natural growth may become in excess of the density limit.'

"We find that plaintiff's ordinance is capricious, arbitrary, and in violation of the Due Process Clause of the Michigan Constitution in that it limits the compensation of groups in a manner that is not rationally related to the stated goals of the zoning ordinance." [Footnote omitted.]

Also note in *State* v. *Baker*, 405 A.2d 368, 371 (N.J. 1979), the court stated in part that:

"Nevertheless, the power to attain these goals is not without limits. A municipality may not, for example, zone so as to exclude from its borders the poor or other unwanted minorities. (Citations omitted.) Nor may zoning be used as a tool to regulate the internal composition of housekeeping units. (Citations omitted.) A municipality must draw a careful balance between

> preserving family life and prohibiting social diversity."

In *Kirsch Holding Company* v. *Borough of Manasquan*, 281 A.2d 513, 520 (N.J. 1971), the court stated in part that:

> ". . . Zoning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations. When intensity of use, *i. e.*, overcrowding of dwelling units and facilities, is a factor un that conduct (as it well may be here on the theory that, pragmatically speaking, fewer people make less noise and disturbance), consideration might quite properly be given to zoning or housing code provisions, which would have to be of general application, limiting the number of occupants in reasonable relation to available sleeping and bathroom facilities or requiring a minimum amount of habitable floor area per occupant . . . ."

The bottom line is whose definition of a "family" are the courts going to accept. If the tenants acted as a "family", who is to say that they are not a "family".

The Supreme Court of the State of New Jersey held that ten college students living together were "family" in *Borough of Glassboro* v. *Vallorosi*, 568 A.2d 888, 894 (N.J. 1990) and stated:

> ". . . The uncontradicted testimony reflects a plan by ten sophomore college students to live together for three years

> under conditions that correspond substantially to the ordinance's requirement of a 'stable and permanent living unit.' . . . The students ate together, shared household chores, and paid expenses from a common fund. Although the students signed four-month leases, the leases were renewable if the house was 'in order' at the end of the term. Moreover, the students testified to their intention to remain in the house throughout college, and there was no significant evidence of defections up to the time of trial . . . ."

In *Ocean County* v. *Long Beach Tp.*, 599 A.2d 1309, 1314 (N.J. 1991), the court stated in part that:

> "Once again, there is a 'fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships' and 'such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved.' *Baker, supra*, 81 N.J. at 107, 405 A.2d 368. Thus, even if a 'permanency' standard could be used to develop a sustainable ordinance, the court finds that the ordinance before it is still sweepingly excessive and legally unreasonable."

In *City of Des Plaines* v. *Trottner*, 216 N.E.2d 116, 118-119 (Ill. 1966), the court stated in part that:

"While single-family residence zoning is a familiar, perhaps universal, characteristic of zoning ordinances, the questions relating to precise definitions of the term 'family' have not arisen frequently. Our own decisions have not involved such questions. The ordinance before the court in Harmon v. City of Peoria, 373 Ill. 594, 27 N.E.2d 525, defined 'family' as 'one or more persons occupying a premises and living as a single housekeeping unit as distinguished from a group occupying a boarding house, lodging house, or hotel.' And in Anderman v. City of Chicago, 379 Ill. 236, 40 N.E.2d 51, the ordinance defined 'family' as 'One or more individuals living, sleeping, cooking and eating on the premises as a single housekeeping unit.'

. . .

". . . Family groups are mobile today, and not all family units are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar. And so far as intensity of use is concerned, the definition in the present ordinance, with its reference to the 'respective spouses' of persons related by blood, marriage or adoption, can hardly be regarded as an effective control upon the size of family units."

In *City of Santa Barbara* v. *Adamson*, 610 P.2d 436, 439, 441-442 (Calf. 1980), the court stated in part that:

> "Do the ordinance's restrictions . . . respect the commands of the California Constitution concerning people's rights to enjoy life and liberty, to possess property, and to pursue and obtain happiness and privacy?
>
> "Population density can be regulated by reference to floor space and facilities. Noise and morality can be dealt with by enforcement of police power ordinances and criminal statutes. Traffic and parking can be handled by limitations on the number of cars (applied evenly to all households) and by off-street parking requirements. *In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users.* (Citations omitted.)" (Italics emphasis in original quoted text.)

In *Incorp. Village of Freeport* v. *Association, Etc.*, 406 N.Y.S.2d 221, 223 (1977), the court stated in part that:

> "However, in defining a 'family' as' persons related by blood, marriage or adoption', the village zoning ordinance unnecessarily restricts the concept of the family unit, and is contrary to the holding in City of White Plains v. Ferraioli, 34 N.Y.2d 300, at 305, 357 N.Y.S.2d 449, at 452, 313 N.E.2d 756 at 758, that '**zoning is intended to**

> **control types of housing and living and not the genetic or intimate internal family relations of human beings'."** (Bold emphasis added.)

Moreover, in *420 East 80th Co.* v. *Chin*, 468 N.Y.S.2d 9, 10 (1983), the court stated in part that:

> "'[A]bsent a showing of demonstrable prejudice to the landlord, violation of legal occupancy laws or waste to the property . . .', the increased occupancy at bar did not constitute a violation of a substantial obligation of the tenancy. Citing Matter of Park East Land Corp. v. Finkelstein, 299 N.Y. 70, 74, 85 N.E.2d 869, the court observed that '[a] determination of what constitutes a violation of a substantial obligation of a tenancy is to be made . . . with reference to the peculiar legal and factual setting in which it occurs . . . . Judicial notice can be taken that the vacancy rate for rental apartments in this city is virtually non-existent . . . . In the housing field, these are not ordinary times and 'strict adherence to technical concepts of landlord and tenant law' which have justified eviction in the past is now to be avoided.'"

Also see *Avrum Realty Corp.* v. *Talton*, 467 N.Y.S.2d 489, 490 (1983) ("siblings qualify as immediate family members").

In other words, the subject ordinance of the Town of Hanover clearly violates the rights

provided by the Constitution of the State of New Hampshire.

2. Does an unreasonably short restriction of time for the hearing of damages of an action by the trial court such as one hour amount to a denial of due process and equal protection?

The petitioner contends that the one-hour limitation for the hearing amounts to a denial of due process and equal protection under the Constitution of the United States especially when the petitioner requested more time prior to the hearing.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of New Hampshire.

Respectfully submitted,

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Petitioner

Dated: April 2005.

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1. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court and other courts.